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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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**No. 527**  
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CARL M. LOEB, JR.,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE.

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✓  
**No. 528**  
\_\_\_\_\_

HENRY A. LOEB,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE.

\_\_\_\_\_  
PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.  
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ARTHUR B. HYMAN,  
*Counsel for Petitioners.*



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**PETITION FOR WRITS OF CERTIORARI.**

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MAY IT PLEASE THE COURT:

The petition of Carl M. Loeb, Jr., and Henry A. Loeb respectfully shows to this Honorable Court:

A.

**Summary Statement of the Matter Involved.**

These proceedings, involving the same questions of law, were consolidated for hearing and decision before the

United States Board of Tax Appeals, and the records and briefs before the Circuit Court of Appeals were likewise consolidated for argument before that court.

The case of Carl M. Loeb, Jr., involves alleged deficiencies in income taxes for the years 1933 and 1934 in the sums of \$2,611.75 and \$7,006.99, respectively.

The case of Henry A. Loeb involves an alleged deficiency for the year 1934 in the sum of \$5,915.01.

The claimed deficiencies result from a determination by the Commissioner that the income of a trust created by the petitioners was taxable to them as grantors under Section 167 (a) (2) of the Revenue Acts of 1932 and 1934 because, in the discretion of someone held by him to have no substantial adverse interest, it might have been distributed to them, regardless of the fact that it neither was distributed to nor accumulated for them nor applied nor applicable to the discharge of their obligations, and that the distribution thereof was not subject to their control.

The trust instrument involved conveyed absolutely to the trustee the property therein mentioned and described, with no power reserved in the grantors over the *corpus* or income, with no provision for its application to the discharge of any obligations of the grantors, with no power to compel the resignation of the trustee or to substitute others or to appoint a successor upon the resignation or incapacity of the trustee, with no power over investment and none over administration, and with no power to revoke.

The Court of Appeals, in affirming the Board of Tax Appeals, which, in turn, sustained the determination of the Commissioner, holds that the words "substantial adverse interest" in the disposition of the income mean a direct interest in such income, and that the trustee's power to distribute the income to his wife, to whom he owed the duty of support, to the exclusion of the grantors, was not a direct interest in its disposition.

The questions involved are as follows:

1. Does a trustee to whom property is irrevocably conveyed, with sole and absolute discretion to distribute the income therefrom in such shares and proportions as he might designate, and to such of the beneficiaries named in the trust instrument as he might appoint, consisting of his wife, to whom he owes the duty of support, and four adult children, two of whom are the grantors, have an interest in the disposition of such income substantially adverse to that of the grantors?

2. Is section 167(a)(2) of the Revenue Acts of 1932 and 1934 constitutional if construed to permit the taxation to the grantors of income of a trust which was neither distributed to nor accumulated for them, nor applied nor applicable to the discharge of their obligations, and the distribution of which was not subject to their control?

The material facts, briefly stated, are as follows:

Prior to 1918, Carl M. Loeb, petitioners' father, had created a trust under which he and his wife, Adeline L. Loeb, were trustees, for their four children, John L., Margaret L., and the petitioners. Each of the children was granted an undivided one-fourth interest in the corpus of the trust, which was distributable to such child upon arrival at the age of forty, or, in the discretion of the trustees, after arrival at the age of twenty-one (R. 54).

In 1928, after petitioners had arrived at the age of twenty-one, Carl M. Loeb told them that the property held in trust for their sister and brother, Margaret L. and John L., had been distributed several years before and that subsequent to such distribution the property remaining in trust for petitioners had so enhanced in value and had assumed such a large proportion of the value of the estate as a whole that he felt it was only fair that their mother, sister and eldest brother should participate in it.

He therefore proposed that petitioners take their distributive shares of the trust at that time and create a new trust for the benefit of their mother, sister, eldest brother and themselves (R. 54).

The petitioners acceded to this request, whereupon the old trust was terminated (R. 54) and, by instrument executed on January 16, 1929, petitioners conveyed the afore-said distributive shares to their father, Carl M. Loeb, as trustee, in trust, to receive and collect the income therefrom and to pay the same over, on the 31st day of December in each year during the continuance of the trust, to such and so many of the following beneficiaries, or the survivors of them, and in such shares and proportions as said trustee, so long as he should remain such, in his absolute discretion should from time to time designate and appoint, namely:

Adeline L. Loeb, wife of the trustee and mother of the grantors;

Margaret L. Kempner, daughter of the trustee and sister of the grantors;

John L. Loeb, son of the trustee and brother of the grantors;

Carl M. Loeb, Jr., Henry A. Loeb, grantors;

and any one or more of the surviving descendants of any of the four last named beneficiaries who should die during the continuance of the trust (R. 44-51).

The new trust was irrevocable and was to continue until the death of Carl M. Loeb, when the corpus was to be divided equally among all of the above named beneficiaries, except Adeline L. Loeb, the wife of the trustee.

Successor trustee or trustees could be appointed under certain circumstances by a majority of the adult beneficiaries. Such successor or successors had no discretion as to the distribution of the income but were required to distribute the same annually, in equal proportions, among the aforementioned five beneficiaries.



At the time of the creation of the trust, the grantors and each of the other beneficiaries were over the age of twenty-one (R. 57).

Carl M. Loeb, the trustee, was possessed of substantial resources and maintained his family upon a scale of living consistent with his means. He and his wife lived together in one household and their living and household expenses exceeded \$25,000 per annum, exclusive of rent. The distributions received by his wife, Adeline L. Loeb, from the said trust, together with the income from her separate estate, were used by her to defray these expenses (R. 42). She was possessed of a separate estate created for her by her husband, but it does not appear that such estate was substantial (R. 41).

During the year 1934, one of the taxable years in question, normal income from her separate estate was \$6,184.46, against which she had capital losses of \$5,324.25, so that her actual net income from her separate estate was only \$860.21 (R. 43). However, she received a distribution of \$24,892.22 from the trustee during that year, making her total income for 1934 \$25,752.43, approximately the amount which she needed to defray the household and living expenses of her husband and herself (R. 43).

Distributions by the trustee in each of the years that the trust was in existence were as follows:

For 1929, to John L. Loeb, \$39,791.05; to Henry A. Loeb, \$79,582.11, and to Carl M. Loeb, Jr., \$79,582.11; in 1930, the entire income of the trust, to wit, \$40,560.90, to Adeline L. Loeb, the wife of the trustee; in 1931, there was no income and no distribution; in 1932, the entire income of the trust, to wit, \$15,362, to Adeline L. Loeb; in 1933, there was no income and no distribution, but due to limitations on the deduction of capital losses, there was taxable income which has been included by the Commissioner in the income of the petitioners; for 1934, \$24,892.22 to Adeline L. Loeb; \$20,000

to Margaret L. Kempner, and \$5,000 to Henry A. Loeb, one of the grantors. Carl M. Loeb, Jr., the other grantor, received nothing. In 1935, the income was distributed in three equal parts of \$52,550.92 each to Adeline L. Loeb, the trustee's wife, to Margaret L. Kempner and to Henry A. Loeb (R. 59).

Income was reported by the recipients thereof and the tax duly paid thereon by them.

B.

**Reasons Relied On for the Allowance of the Writs.**

1. The court below has held that Carl M. Loeb, the trustee, did not have a substantial adverse interest, as the term is used in Section 167 of the Revenue Acts of 1932 and 1934, in the income of the trust in question because he had no direct interest therein.

This narrow definition of a substantial adverse interest is in direct conflict with the determination of the Circuit Court of Appeals for the Eighth Circuit in *Helvering v. Hormel*, 111 F. (2d) 1 (certiorari granted Oct. 14, 1940), and of the Circuit Court of Appeals for the Third Circuit in *Savage v. Commissioner*, 82 F. (2d) 92.

In *Helvering v. Hormel*, a mother, to whom trust income was paid as guardian for the use of her children, was held to have a substantial adverse interest in the trust income under section 167 of the Revenue Act of 1934, and in *Savage v. Commissioner*, a father, receiving trust income for the use of his children, was held to be a beneficiary of the trust within the intendment of section 166 of the Revenue Act of 1928. In neither of these cases was there a direct interest in the trust income as required by the determination of the Court of Appeals in the instant case.

2. The decision below is also in conflict with *Raoul H. Fleischmann v. Commissioner*, 40 B. T. A. 672 (in which

the Commissioner has announced his acquiescence), where a mother was held to have a substantial adverse interest in the income of a trust providing for the support of her children although she herself had no direct interest therein.

It is likewise in conflict with *Olive H. Prouty v. Commissioner*, 41 B. T. A. 277, and *Freda R. Caspersen v. Commissioner*, 40 B. T. A. 758, in each of which a parent was held to have a substantial adverse interest in trust income to be distributed to his or her children although possessing no direct interest therein.

These cases were determined by the Board of Tax Appeals subsequent to the Board's determination in the instant cases, but no attempt was made to reconcile the conflicting views expressed by the Board. *Olive H. Prouty v. Commissioner* is on appeal to the Circuit Court of Appeals for the First Circuit and has already been submitted for determination, and *Freda R. Caspersen v. Commissioner* is on appeal to the Circuit Court of Appeals for the Third Circuit and shortly will be submitted for determination.

3. This Court has not passed upon the constitutionality of section 167 of the Revenue Acts of 1932 and 1934, as re-enacted in the same numbered sections of the Internal Revenue Code, construed so as to tax to the grantor of a trust income which was neither distributed to nor accumulated for him nor applied nor applicable to the discharge of his obligations, and the distribution of which was not subject to his control. The determination of the Court of Appeals that, as so construed, the section is constitutional, is in conflict with fundamental constitutional doctrines enunciated by this Court in *Heiner v. Donnan*, 285 U. S. 312; *Hoeper v. Tax Commission*, 284 U. S. 206; *Schlesinger v. Wisconsin*, 270 U. S. 230, and *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170. The existence of this taint was recognized in the dissenting opinion in *Charles H. Mott v. Commissioner*, 30 B. T. A. 1040.

4. Certiorari has been granted in *Helvering v. Hormel, supra*, which will bring before this court for consideration for the first time the meaning of the term "substantial adverse interest", as used in the statutes\*, and the constitutionality of a Congressional attempt, if the statutes be so construed, to tax to the grantor of a trust income which has been irrevocably transferred and over which he retains no control.

Like questions are involved in these cases, and it is respectfully suggested that certiorari should be granted here so that a complete presentation of the subject may be made. Furthermore, unless certiorari is granted, the judgments of the Court of Appeals will become final before this Court can reach a conclusion in the *Hormel* case, thus leaving the petitioners without remedy.

5. In the interest of administrative efficiency in the collection of revenue, the questions presented should be speedily resolved. They are presented here in simple and direct form.

WHEREFORE, petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court, for its review and determination on a day certain therein to be named, a full and complete transcript of the record and of proceedings in those cases, numbered and entitled on its docket Nos. 292-293, *Carl M. Loeb, Jr. v. Commissioner of Internal Revenue*, and *Henry A. Loeb v. Commissioner of Internal Revenue*, and that said judg-

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\* In the *Hormel* case, the Circuit Court agreed with the Board that the petitioner was not taxable under Section 167, but reversed the determination of no deficiency on the ground that he was taxable under Section 22(a). The Commissioner, however, will undoubtedly seek to sustain the judgment below by relying not only on Section 22(a) but on Section 167.

ments of the Court of Appeals for the Second Circuit may be reviewed by this Honorable Court, and that these petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

CARL M. LOEB, JR., AND

HENRY A. LOEB,

By ARTHUR B. HYMAN,

*Counsel for Petitioners.*